

**Before the
Federal Communications Commission
Washington, DC 20554**

VERIZON MARYLAND LLC,

Complainant,

v.

THE POTOMAC EDISON COMPANY,

Defendant.

Proceeding No. 19-355
Bureau ID No. EB-19-MD-009

**VERIZON'S REPLY IN FURTHER SUPPORT OF ITS
PETITION FOR RECONSIDERATION AND CLARIFICATION**

VERIZON MARYLAND LLC

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I. Introduction and Summary

Potomac Edison opposed reconsideration by misrepresenting the law and the record and requesting “sole discretion” to charge Verizon the maximum rate the Commission ordered.¹ In these and other ways, Potomac Edison confirmed reconsideration is needed, or Potomac Edison will complicate rate negotiations—which it has refused to start—and misuse the Commission’s *Order*² to try to perpetuate the unlawful rate disparities the *Order* is meant to correct.

Potomac Edison’s primary argument is that it may lawfully charge Verizon pole attachment rates up to [REDACTED] times the new telecom rate Potomac Edison calculated and charged Verizon’s competitors *without* proving it incurred a single unique and unreimbursed cost because of Verizon’s attachments.³ But the new telecom rate is already “fully compensatory.”⁴ To charge a higher rate, Commission precedent requires that Potomac Edison prove it has incurred unique costs to justify the additional cost recovery. Otherwise, Potomac Edison will be overcompensated by an artificially high pole attachment rate.

Potomac Edison says cost quantifications are “problematic,” so should be eliminated when determining the just and reasonable rate for Verizon.⁵ But quantifications are only “problematic” for Potomac Edison because it relies on hypothetical and non-existent claims of

¹ See PE Opp’n to Pet’n for Reconsideration (“PE Opp’n”). Potomac Edison’s pending petition for reconsideration asks to increase the maximum rate the Commission ordered by nearly [REDACTED], from \$12.12 per pole to [REDACTED] per pole.

² *Verizon Md. LLC v. The Potomac Edison Company*, Memorandum Opinion and Order, 35 FCC Rcd 13607 (2020) (“*Order*” or “*Memorandum Opinion and Order*”).

³ Potomac Edison charged a [REDACTED] new telecom rate, but wants to charge Verizon [REDACTED] per pole. See PE Petition for Reconsideration ¶ 37; PE Opp’n ¶ 35; Answer ¶ 101.

⁴ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5299 (¶ 137) (2011) (“*Pole Attachment Order*”).

⁵ See PE Opp’n ¶¶ 32-33.

“competitive advantage” that do not affect its bottom line. Potomac Edison wants to charge Verizon rates far higher than new telecom rates based on:

- a difference between pole access guaranteed by statute and pole access provided by contract even though the new telecom rate “enables a utility to recover *all of the costs* that are attributable to the pole attachment ... whether the attachment is obtained through voluntarily signed contracts or through mandatory access,”⁶
- an assignment of excess pole space that has been unlawful and unenforceable for a quarter century,⁷ and
- work Verizon already pays for, either by performing the work itself or by covering Potomac Edison’s costs.⁸

Potomac Edison will receive a windfall if it charges Verizon a rate higher than the new telecom rate for any of these reasons. The Commission should grant Verizon’s reconsideration petition and revise its *Memorandum Opinion and Order* to again reinforce “the Commission’s fundamental proposition that artificial, non-cost-based differences” in the pole attachment rates charged competitors are not just, reasonable, or permitted by law.⁹

II. The Commission Should Grant Reconsideration Because Its Pole Access and Allocated Pole Space Findings Are Contrary to Law and Fact.

The Commission should delete three bullet points from paragraph 20 of its *Order*, which artificially increase Verizon’s rate based on Verizon’s more limited and less advantageous contractual access to Potomac Edison’s poles (bullet points 1 and 3) and the unlawful and unenforceable allocation of excess pole space to Verizon (bullet point 2).

⁶ *Ala. Cable Telecommc’ns Ass’n v. Ala. Power Co.*, 16 FCC Rcd 12209, 12232 (¶ 52) (2001).

⁷ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16079 (¶ 1170) (1996) (“1996 Local Competition Order”).

⁸ See *Verizon Va. v. Va. Elec. & Power Co.*, 32 FCC Rcd 3750, 3759 (¶ 18) (EB 2017) (“*Dominion Order*”) (“[W]e agree with Verizon that Dominion may not ‘embed in Verizon’s rental rate costs that Dominion does not incur.’”).

⁹ See *Am. Elec. Power Co. v. FCC*, 708 F.3d 183, 190 (D.C. Cir. 2013).

A. Limited Contractual Pole Access Is a Competitive Disadvantage as Compared to Guaranteed Statutory Access.

The Commission should delete its pole access findings because Verizon's contractual access to Potomac Edison's poles is a disadvantage as compared to the far broader statutorily guaranteed pole access that Verizon's cable and CLEC competitors enjoy, which cannot be terminated.¹⁰ In addition, prior precedent precludes electric utilities from charging a higher pole attachment rate because pole access is obtained by contract instead of mandated by statute.¹¹ As the Commission explained, a pole owner's costs do not change based on how pole access is acquired. And so the same cable or new telecom rate is just and reasonable, "enables a utility to recover *all of the costs* that are attributable to the pole attachment," and "provides just compensation for the use of [the] poles ... whether the attachment is obtained through voluntarily signed contracts or through mandatory access."¹²

Potomac Edison's defense of the pole access findings misrepresents the law and the record. *First*, Potomac Edison claims Verizon's contractual access includes a right to reserve excess space on a pole.¹³ This is not true. Verizon cannot "reserve" space under the joint use agreement¹⁴ or under the law.¹⁵ And so Verizon cannot be competitively advantaged by an alleged right it does not have and could not exercise if it did.

Second, Potomac Edison says it needs to notify Verizon of plans to deploy new pole lines, but is not contractually required to provide the same notification to Verizon's

¹⁰ See 47 U.S.C. § 224(f); see also Verizon Petition for Reconsideration, Section I.A.

¹¹ *Ala. Cable Telecommcn's Ass'n*, 16 FCC Rcd at 12232 (¶ 52).

¹² *Id.* (emphasis added).

¹³ PE Opp'n ¶ 3.

¹⁴ Verizon is "assigned" space that Potomac Edison also leases to third parties. Complaint Ex. 1 at VZ00110, VZ00116 (JUA, Arts. II, XV); Revised Joint Statement, Stipulated Facts ¶¶ 24-25.

¹⁵ See 1996 Local Competition Order, 11 FCC Rcd at 16079 (¶ 1170).

competitors.¹⁶ Potomac Edison does not say whether it *has* notified Verizon of such plans (it has not) or whether it would provide comparable notice (though not required) to Verizon’s competitors to ensure it installs poles that do not require immediate replacement. Nor does it explain how providing notice using its simple electronic notification program could possibly justify its collection of more than [REDACTED] million in rent above the new telecom rate each year.¹⁷

Third, Potomac Edison notes that the narrow exceptions to the statutory access provided Verizon’s competitors (for “insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes”) are not expressly included in the parties’ joint use agreement.¹⁸ But the joint use agreement provides Potomac Edison far *greater* discretion to deny Verizon access to its poles—it may deny Verizon access to any pole if Potomac Edison determines in its sole “judgment” that its plans make “joint use of such poles undesirable.”¹⁹ And by terminating the joint use agreement, Potomac Edison may deny Verizon access to all future pole lines, thereby complicating Verizon’s future deployment and increasing its costs.²⁰

The limited exceptions to statutory access also do not create a competitive advantage because Potomac Edison does *not* rely on them to deny access. Its parent company explained that “ever since regulation of communications company attachments began, electric utility pole owners have voluntarily replaced poles to expand pole capacity with taller or stronger poles to

¹⁶ PE Opp’n ¶ 4.

¹⁷ Potomac Edison charged a [REDACTED] new telecom rate, but wants to charge Verizon [REDACTED] per pole. *See* PE Petition for Reconsideration ¶ 37; PE Opp’n ¶ 35; Answer ¶ 101. With Verizon facilities attached to 79,264 Potomac Edison poles, this rate disparity totals [REDACTED].

¹⁸ *See* PE Opp’n ¶ 6; *see also* 47 U.S.C. § 224(f); *Pole Attachment Order*, 26 FCC Rcd at 5341 (¶ 232) (narrowly construing when electric utilities may deny access for lack of capacity).

¹⁹ *See* Complaint Ex. 1 at VZ00109 (JUA, Art. I(b)).

²⁰ *See id.* at VZ00118 (JUA, Art. XXI).

accommodate new attachers, despite having no legal requirement to do so.”²¹ Potomac Edison also seldom *could* deny access because “there are rarely issues with the ... availability of capacity” on poles for new attachers.²² Potomac Edison thus relies on an academic but nonexistent difference, which should not artificially increase the rates Verizon pays.

Potomac Edison also incorrectly claims Verizon does not separately and fully compensate Potomac Edison when it replaces poles to accommodate Verizon’s facilities.²³ In these rare situations, Verizon covers the costs it causes—the loss on the replaced pole, additional costs associated with the replacement pole, and the transfer costs to move Potomac Edison’s facilities to the replacement pole.²⁴ Commission precedent thus precludes Potomac Edison from charging Verizon more than the new telecom rate based on these pole replacement costs because they “have already been recovered through make-ready fees.”²⁵

Fourth, Potomac Edison speculates that Verizon may be able to deploy its facilities faster because it has contractual access instead of statutory access.²⁶ This argument conflicts with the Commission’s regulations because, as Potomac Edison concedes, “the Commission’s ‘timely

²¹ Comments of FirstEnergy, et al. at i, *Accelerating Wireline Broadband Deployment*, WC Docket No. 17-84 (Sept. 2, 2020); *see also* PE Opp’n ¶ 8.

²² *See* Notice of Ex Parte of EEI, et al. at 3, *Accelerating Wireline Broadband Deployment*, WC Docket No. 17-84 (Dec. 17, 2020); *see also* Comments of Duke Energy Corp., et. al at 16-17, *Accelerating Wireline Broadband Deployment*, WC Docket No. 17-84 (Sept. 2, 2020) (0.024% of electric utility poles require replacement each year to increase capacity).

²³ *See* PE Opp’n ¶ 10.

²⁴ Potomac Edison misleads when it claims Verizon pays only the “net loss” associated with a replaced pole by ignoring the prior subsection in the agreement. *See id.* (quoting JUA, Art. VIII(b)); *see also* Complaint Ex. 1 at VZ00112-13 (JUA, Art. VIII(a)).

²⁵ *See, e.g., Cost Allocator Order*, 30 FCC Rcd at 13745 (¶ 30) (“Because access costs have already been recovered through make-ready fees, pole attachment rental rates are concerned solely with the pole owner’s recovery of operating costs; they should have nothing to do with the ‘predictability and timeliness’ of access.”).

²⁶ PE Opp’n ¶ 12; *see also id.* ¶ 7.

access’ regulations do not apply to Verizon” as an ILEC.²⁷ This means that Verizon typically must wait for all other attachers to complete their work before Verizon can even begin—a wait that Verizon cannot accelerate using the FCC’s make-ready deadlines, one-touch make-ready option, or the self-help remedy that speed deployment for Verizon’s competitors.²⁸ Verizon then performs its make-ready work itself, including all work to collect and process the information on the pole photograph and profile sheet Potomac Edison relies upon.²⁹ These differences, therefore, do not justify a higher rate because they are “costs that only Verizon incurs.”³⁰

Finally, Potomac Edison reinforces two competitive *disadvantages* related to Verizon’s contractual access: (1) absent Commission intervention, Verizon must pay Potomac Edison’s unlawfully high rates even after the agreement terminates, and (2) after the agreement terminates, Verizon does not have a right to attach to future Potomac Edison pole lines.³¹ Verizon’s competitors are instead protected by guaranteed new telecom rates and statutory access to all of Potomac Edison’s poles—existing and future. The Commission should revise its *Order* to reflect Verizon’s more limited and less advantageous contractual access, which does not warrant a pole attachment rate higher than the fully compensatory new telecom rate.

B. Potomac Edison Misstates the Law and Facts to Try to Salvage Its “Reserved” Pole Space Claim.

The joint use agreement’s assignment of excess space to Verizon cannot provide a real-world competitive advantage because it is unenforceable and unlawful.³² In addition, pole space

²⁷ PE Opp’n ¶ 12.

²⁸ *See id.*; *see also* 47 C.F.R. § 1.1411.

²⁹ *See* PE Opp’n ¶ 7; *see also* Reply Ex. A at VZ00387 (Mills Reply Aff. ¶ 9).

³⁰ *See Dominion Order*, 32 FCC Rcd at 3759 (¶ 18 n.67).

³¹ *See* PE Opp’n ¶¶ 14-15.

³² *See* Verizon Petition for Reconsideration, Section I.B. *But see Memorandum Opinion and Order*, 35 FCC Rcd at 13615 (¶ 20, bullet point 2).

cannot justify charging Verizon a rate higher than the new telecom rate because the new telecom rate already is “fully compensatory” for the pole space Verizon occupies.³³

Potomac Edison’s space reservation arguments misrepresent the law and the record. *First*, space is not “reserved” for Verizon under the joint use agreement.³⁴ Instead, the 1959 agreement “*assigned*” space to Verizon, with the caveat that other communications companies could also attach.³⁵ And there is no question that they have. Potomac Edison stipulated that it “sometimes allows Verizon’s competitors to attach within the three feet of space allocated to Verizon” and collects rent from them “without offset to the rent it collects from Verizon.”³⁶

Second, Potomac Edison cannot “reserve” or “assign” excess space to Verizon, as such space reservations have been unlawful for a quarter century.³⁷ This prohibition applies to *all* poles governed by Section 224(f)—not just ILEC-owned poles as Potomac Edison contends—because setting aside vacant usable space discriminates and unlawfully denies cable companies and CLECs their statutorily guaranteed right of access to that space.³⁸

Third, Potomac Edison cannot “negotiate whatever rates [it] want[s]” or demand space reservations the Commission prohibited.³⁹ Verizon has a statutory right to just and reasonable

³³ See, e.g., *Pole Attachment Order*, 26 FCC Rcd at 5299 (¶ 137).

³⁴ See PE Opp’n ¶ 19.

³⁵ See Complaint Ex. 1 at VZ00109-10, VZ00116 (JUA, Arts. II, XV).

³⁶ Revised Joint Statement, Stipulated Facts ¶¶ 24-25.

³⁷ *1996 Local Competition Order*, 11 FCC Rcd at 16079 (¶ 1170) (“Permitting an incumbent LEC, for example, to reserve space for local exchange service ... would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers.”).

³⁸ As a result, the only exception to the prohibition applies “when an electric utility asserts a future need for capacity for electric service since the statute does not require nondiscriminatory treatment of all utilities; rather, it requires nondiscriminatory treatment of all telecommunications and video providers.” *Id.*; but see PE Opp’n ¶ 21.

³⁹ PE Opp’n ¶ 23.

rates, and its competitors have a statutory right to non-discriminatory access. These statutory rights “may not be defeated by private contractual provisions.”⁴⁰ Indeed, pole attachment rates are regulated to correct such abuses of pole ownership to “extract monopoly rents.”⁴¹

Fourth, the Commission found Verizon and its competitors occupy comparable space on Potomac Edison’s poles, so Verizon’s rate must be calculated using the Commission’s presumptive 1-foot space occupied input.⁴² Potomac Edison’s new argument that Verizon “actually” occupies [REDACTED]-feet of space is wrong.⁴³ Potomac Edison has doubled the inflated [REDACTED]-foot value the Commission previously rejected by including even more *unoccupied* space below Verizon’s facilities.⁴⁴ The Commission correctly rejected use of unoccupied space below Verizon’s facilities to artificially increase rates.⁴⁵

III. The Commission Should Clarify and Reinforce Its Cost-Based Rate Requirement.⁴⁶

The Commission should again reinforce the “fundamental proposition that artificial, non-cost-based differences” in pole attachment rates are not just, reasonable, or permitted by law.⁴⁷ Potomac Edison charged Verizon’s competitors a [REDACTED] new telecom rate, but seeks to charge

⁴⁰ *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order, 33 FCC Rcd 7705, 7731 (¶ 50) (2018).

⁴¹ *See Pole Attachment Order*, 26 FCC Rcd at 5242 (¶ 4) (citation omitted).

⁴² *Memorandum Opinion and Order*, 35 FCC Rcd at 13642 (¶ 37); *see also* 47 C.F.R. § 1.1410.

⁴³ *See* PE Opp’n ¶ 25; *see also* Verizon Opp’n to PE Petition for Reconsideration at 5-6, 11-13.

⁴⁴ *See* Answer ¶ 89 (“Verizon’s attachments occupy [REDACTED] feet ([REDACTED] inches on Potomac Edison’s poles”); *see also* Verizon Opp’n to PE Petition for Reconsideration at 11-13.

⁴⁵ *See Memorandum Opinion and Order*, 35 FCC Rcd at 13624 (¶ 37); *see also BellSouth Telecommunications, LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, 35 FCC Rcd 5321, 5330 (¶ 16) (EB 2020) (“[U]nder the Commission’s rate formula, ‘space occupied’ means space that is ‘actually occupied.’”); Verizon Opp’n to PE Petition for Reconsideration at 11-13.

⁴⁶ Verizon’s request to clarify the rate negotiation requirement is unopposed, as Potomac Edison agrees the *Order* requires a new rate provision, but not a new agreement. *See* PE Opp’n ¶ 36.

⁴⁷ *See Am. Elec. Power Co.*, 708 F.3d at 190.

Verizon a \$12.12 old telecom rate—or an even higher and improperly calculated [REDACTED] rate—without quantifying a single relevant cost that is not already recovered through the new telecom rate formula.⁴⁸ Potomac Edison’s misreading of the *Order* is contrary to the Commission’s precedent and policy objectives and confirms that clarification is needed.

First, central to a decade of the Commission’s pole attachment rate reforms is the indisputable fact that a new telecom rate is “just, reasonable, and fully compensatory” to the pole owner.⁴⁹ It is designed to ensure there is no “category or type of costs that are caused by the attacher that are not recovered through the new telecom rate.”⁵⁰ And so a rate higher than the new telecom rate requires evidence of relevant *costs* incurred by the pole owner.⁵¹ Without such evidence, artificial rate disparities will persist. And so it is not enough (as Potomac Edison argues) that rates are calculated using reported cost data.⁵² Potomac Edison is fully compensated by a new telecom rate. If it wants to charge a higher rate, it must justify the differential.

Second, it is already the law that Potomac Edison must justify a rate higher than the new telecom rate with quantified costs that it incurs and cannot “overstate” their value.⁵³ This cost-based requirement focuses on whether Potomac Edison, in fact, incurs unique and unreimbursed costs, an inquiry that is not complicated, subjective, or difficult as Potomac Edison contends.⁵⁴

⁴⁸ See PE Opp’n ¶¶ 32-33.

⁴⁹ See, e.g., *Pole Attachment Order*, 26 FCC Rcd at 5299 (¶ 137).

⁵⁰ *Id.* at 5321 (¶ 182).

⁵¹ See, e.g., *Cost Allocator Order*, 30 FCC Rcd at 13741 (¶ 22) (eliminating ability of non-cost-based allocators in new telecom rate formula to artificially increase rates and create “artificial marketplace distortions”); see also *Dominion Order*, 32 FCC Rcd at 3759 (¶ 20); *Verizon Fla. v. Fla. Power and Light Co.*, 30 FCC Rcd 1140, 1149 (¶ 24) (EB 2015).

⁵² PE Opp’n ¶ 30.

⁵³ *Dominion Order*, 32 FCC Rcd at 3758-59 (¶¶ 18, 20) (faulting electric utility for failing to “quantify the purported material advantages that Verizon receives”).

⁵⁴ PE Opp’n ¶ 32.

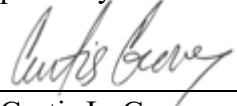
If Potomac Edison incurs a relevant unreimbursed cost, Potomac Edison would have the documentation to prove it. Instead, it relies on speculation, hypotheticals, and abstract theories to try to perpetuate its artificially inflated rental stream.⁵⁵

Third, Potomac Edison does not have “sole discretion” to charge Verizon the old telecom rate.⁵⁶ Where an electric utility rebuts the new telecom rate presumption in the Commission’s regulations, the Commission directed “parties to negotiate the appropriate rate or tradeoffs to account” for the value of any proven material advantages, using the old telecom rate as a “hard cap” on the potential range of rates.⁵⁷ Potomac Edison’s claim that it may unilaterally select the rate for Verizon confirms the need for reconsideration and clarification. If unaddressed, Potomac Edison’s misinterpretation and hubris will stymie negotiations,⁵⁸ increase pole attachment litigation, and perpetuate artificial rate disparities contrary to Commission intent.

The Commission should grant Verizon’s petition for reconsideration and clarification.

Respectfully submitted,

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⁵⁵ Potomac Edison is wrong when it claims Verizon did not dispute certain “advantages” in its petition. *See* PE Opp’n ¶ 28. Verizon expressly argued that “the Commission incorrectly identified as competitive advantages [the alleged “advantages” because they] do not affect Potomac Edison’s bottom line.” Verizon Petition for Reconsideration at 8.

⁵⁶ PE Opp’n ¶ 34.

⁵⁷ *Third Report and Order*, 33 FCC Rcd at 7771 (¶¶ 128-29 & n.484).

⁵⁸ As of this filing 49 days after the Commission’s *Order*, Potomac Edison has still not responded to Verizon’s request to commence negotiations as directed by the Commission.

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2021, I caused a copy of the foregoing Verizon's Reply in Further Support of Verizon's Petition for Reconsideration and Clarification to be served on the following (service method indicated):

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